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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PIPEFITTERS LOCAL NO. 636 DEFINED BENEFIT PLAN, et al.,

Plaintiffs,

v. 11 Civ. 733 (WHP)

BANK OF AMERICA CORPORATION, et al.,

Defendants.

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New York, N.Y.
July 30, 2014
10:00 a.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES
(Via Telephone)

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BY: JULIA GUTTMAN

THE COURT: Good morning. This is District Judge Pauley. You are on a speakerphone and a court reporter is present reporting what is being said. I have your e-mail providing your appearances, which will be noted by the court reporter at the start of the transcript. I ask that each of you identify yourselves each time you speak for my benefit and for the benefit of the court reporter.

I sought a telephone conference with you after receiving the proposed modification to the confidentiality order. I have some questions about it. First, I would like to understand from someone, what is the principal purpose of this amendment to the confidentiality order?

MR. CARNEY: Good morning, your Honor. This is David Carney from Skadden. The principal purpose of the amendment to the confidentiality order is to satisfy requirements of state laws dealing with the parties' handling of confidential information. The Gramm-Leach-Bliley Act, the federal law addressing confidential financial information, it does not preempt all 50 state laws in the area. Some state laws require either notice or court-ordered subpoena to issue in order for nonpublic bar or information to be disclosed outside of the financial institution.

The purpose of the protective order amendment -- and its language that has been used in a number of other Bank of America cases, the purpose of the amendment is designed to put

aside the notice and the court-ordered subpoena requirements recognizing that the documents that it will be producing will be identified as confidential and the plaintiff presumably will treat them in accordance with the protective order.

It is really designed to distress how the parties deal with the production of confidential information. If we come to a point where confidential information would potentially be disclosed, for example, as an exhibit, we would address that individually or separately as the need arose.

THE COURT: Mr. Carney, can I deem laws of multiple jurisdictions satisfied without even looking to see what the laws of those jurisdictions require? That is essentially what your stipulation does.

MR. CARNEY: Your Honor, we believe so. Numerous other courts, including Judge Cote in litigation in the FHA cases has entered substantially similar language. But this language appears in protective orders in the Bank of America's litigation around security litigation that put their cases in the commercial division than other federal and state cases. There is substantial other precedence for the courts reaching the same conclusion.

THE COURT: In those other stipulations that have been approved by judges, whether in the commercial division or Judge Cote, is there a provision that explicitly prohibits the disclosing parties from providing notice prior to disclosing

nonparty borrower information?

MR. CARNEY: Your Honor, the language in this order in paragraph 19 is nearly identical to that in the confidentiality order entered by Judge Cote. I am looking to pull up --

THE COURT: Under what authority should I explicitly prohibit financial institutions from complying with state law? What is the purpose of that?

MR. MALLOY: Your Honor, this is Chris Malloy, also from Skadden. I think the state laws that are at issue typically state something along the lines of that the borrower should be given notice that their financial information is going to be used in ways that aren't otherwise contemplated by their financial relationship with a bank, unless the court concludes that such notice should be excused. Then the idea of this order would be to provide that kind of notice would be excused here.

The reason for prohibiting the notice to the borrowers, I think, is principally that if you have -- here we have got potentially thousands and thousands of borrowers that underlie the mortgage loans that are potentially collaterally at issue in some of the issues in this case.

I think that the parties shouldn't be sending out notices to these borrowers relating to this litigation in the sense that it would potentially interfere with their relationship was some of the institutions that are at issue and

things like that. Obviously, if there is a specific need to contact a specific borrower, that is something that the plaintiffs or the defendants could approach the court with respect to.

THE COURT: Prohibiting financial institutions from complying with state law strikes me as undermining the basic principal of federalism. Does it strike you that way, Mr. Malloy?

MR. MALLOY: Well, I don't think that this provision would, for example, prohibit Bank of America from communicating with borrowers on Bank of America loans.

THE COURT: No. It says --

MR. MALLOY: I don't think this would be prohibiting the parties from complying with a state law. The state law says that a borrower has to be notified before financial information is disclosed, unless the court concludes that that notice isn't required. Here, we think this is a compelling case that the notice shouldn't be required because there is a protective order here and this litigation doesn't necessarily involve the borrower or the borrower's information directly, it is more how Bank of America and the other defendants dealt with that information internally. I don't think this is interfering with any financial institution's compliance with state law. Obviously, to the extent that, if that became an issue, that is something that any of the parties here can come back to the

court for relief from.

THE COURT: I am looking at the third line on the second page of the proposed paragraph 19, in addition to the confidentiality order. It reads in part, "Disclosing parties are explicitly prohibited from providing such notice in this action."

While I may agree with you that there shouldn't be a need for disclosure, what authority is there for me to explicitly prohibit disclosing parties from providing such notice?

MR. MALLOY: Well, your Honor has authority to govern the parties before the court. And, here, the issue would be, in effect, you're prohibiting the parties before this court right now from communicating with what is arguably confidential information, which is that some issue concern that a borrower's loan has become part of this litigation.

Are you directing the parties before you from communicating with that borrower, obviously, without obtaining further relief from the court

THE COURT: But that is not what that says. That is not what that says. Disclosing parties are nonparties to this case, aren't they? Isn't that what this is about?

MR. CARNEY: I apologize, I don't have the rest of the order in front of me. The definition of disclosing parties. Disclosing parties are the parties to the litigation. So Bank

of America, for example, in our particular situation, is producing these documents.

THE COURT: Did Judge Cote expressly approve that provision?

MR. CARNEY: I am pulling up Judge Cote's order. Give me one moment.

I am just try to match up the two. The language in Judge Cote's order, I think the similar spot where you are, To the extent that any borrower party information law requires that any person or entity be notified prior to disclosure of nonparty borrower information, where such notice is prohibited by court order, the court directs that, in the view of the protection provided for the information disclosed, it is ordered that the following documents be produced. Producing parties are explicitly prohibited from providing such notices in the action, provided however that this order shall not prohibit any producing party from contacting any person or entity for any other person.

THE COURT: All right.

MR. CARNEY: I think that is substantially similar, but not verbatim, your Honor.

THE COURT: It is not verbatim, but it is certainly analogous.

Look, unless you have got something further to offer to me, I will approve the stipulation, but not that last

sentence beginning with "to the extent," the penultimate sentence. I am not going to prohibit parties from complying with state law. I am prepared to say it is not necessary, but I am not going to prohibit them. I think that it is an affront to federalism. I don't know how anyone can say that there should be a blanket prohibition with complying without knowing what those state laws are.

MR. WASSERMAN: Your Honor, this Adam Wasserman of Dechert. While I am much less informed on the specific issues here, I would note that to the extent there is a federalism concern, the way the language reads is that, to the extent any nonparty borrower information law requires that it be notified absent the court order. The way that I read this on its face is that the prohibition would be consistent with the state laws, given that the state laws themselves would, in fact, contemplate such an order from the court.

Again, I am much less familiar with these statutes than Skadden or others, but taking a look at the language on the face, perhaps that may address some of the federalism concerns.

THE COURT: In light of the colloquy that we have had here, if you want to provide me, Mr. Carney, with some further memorandum on this point, I will be glad to take a look at it.

MR. CARNEY: Your Honor, we will do that. The parties will confer about amendments to that sentence that achieve the

same goals that were designed while addressing your Honor's concerns articulated today.

THE COURT: Thank you very much, everyone. While we are all on the phone together, anything else?

MR. CARNEY: Your Honor, not at this time.

THE COURT: Have a good morning. Take care.

MR. CARNEY: Thank you.

MR. MALLOY: Thank you, your Honor.

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